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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. BUB TAHCHAHLAH BAMFORD, Defendant and Appellant.	C079957 (Super. Ct. Nos. 13F2661, 13F2842, & 14F3951) [OPINION ON TRANSFER]

Defendant Bub Tahchahlah Bamford pleaded no contest to felony driving under the influence (Veh. Code, §§ 23152, subd. (a), 23550.5) with a prior prison term enhancement (Pen. Code, § 667.5, subd. (b))[1] in case No. 13F2842, felony failure to appear (FTA) (§ 1320, subd. (b)) with an on-bail enhancement (§ 12022.1) in case No. 13F2661, and 12 felony FTA counts in case No. 14F3951. The trial court suspended

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[1] Undesignated statutory references are to the Penal Code.

imposition of sentence and placed defendant on probation. When probation was later revoked, the trial court sentenced defendant to a six-year eight-month state prison term.

On appeal, defendant contends the on-bail enhancement should have been stricken because the underlying felony was subsequently reduced to a misdemeanor pursuant to section 1170.18. He also contends that those felony FTA offenses based on felonies that were subsequently reduced to misdemeanors pursuant to section 1170.18, should have been reduced to misdemeanors as well. In our original opinion, we rejected defendant's contentions and affirmed. Thereafter, the Supreme Court granted defendant's petition for review and ultimately transferred the case with directions for this court to vacate our prior decision and to reconsider the cause in light of the recently decided *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*). Applying *Buycks*, we shall strike the enhancements.

BACKGROUND

We dispense with a summary of the facts of defendant's crimes as it is unnecessary to resolve this appeal.

Defendant entered no contest pleas resolving the three cases in three proceedings between July 2, 2014, and July 16, 2014. The felony underlying the on-bail enhancement and felony FTA conviction in case No. 13F2661 was a felony charge for possession of drugs (Health & Saf. Code, § 11377) in case No. 13F2117.[2] The felony underlying three of the felony FTA counts in case No. 13F3951 was the same felony possession of drugs charge from case No. 13F2117. Two other felony FTA convictions in this case were based on felony drug possession charges in case No. 13F2300, and three other felony FTA convictions were based on the felony FTA charge in case No. 13F2661.

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[2] Defendant was convicted by a jury on two felony counts of possession of a controlled substance in case No. 13F2117 at some point before the July 16, 2014, change of plea hearing.

Defendant was placed on probation on August 29, 2014. He did not appeal from his plea and the order placing him on probation. On March 5, 2015, defendant filed section 1170.18 petitions for resentencing as to the felony drug possession convictions in case No. 13F2117 and the felony FTA convictions in case Nos. 13F2661 and 14F3951. On April 13, 2015, the trial court granted the petition as to the drug possession convictions and reduced them to misdemeanors but denied it as to the felony FTA convictions.

The petition for revocation of defendant's probation was filed on April 6, 2015, and probation was revoked on the same day. Defendant was sentenced to his six-year eight-month state prison term on July 22, 2015. He filed notice of appeal on August 4, 2015.

DISCUSSION

I

Proposition 47, " 'the Safe Neighborhoods and Schools Act' " (Act), which was enacted on November 4, 2014, requires "misdemeanors instead of felonies for nonserious, nonviolent crimes . . . unless the defendant has prior convictions for specified violent or serious crimes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, p. 70.) Among the affected crimes are various drug possession offenses, including Health and Safety Code section 11377.

The Act also created section 1170.18, which provides in pertinent part: "A person who, on November 5, 2014, was serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act."

(§ 1170.18, subd. (a).) "A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (§ 1170.18, subd. (k) (hereafter subdivision (k).)

Application of the on-bail enhancements is contingent on felony conviction in a prior case. Under section 12022.1, "if a person charged with a felony (the primary offense) is released on bail or on his or her own recognizance and subsequently is arrested for committing another felony (the secondary offense) while released from custody on the primary offense, and if that person is convicted of both offenses, he or she 'shall be subject to a penalty enhancement of an additional two years in state prison which shall be served consecutive to any other term imposed by the court.' [Citation.]" (*People v. Walker* (2002) 29 Cal.4th 577, 582, fn. omitted.) While not an element of the enhancement, a felony conviction for the primary offense is an essential prerequisite to its imposition. (*In re Jovan B.* (1993) 6 Cal.4th 801, 814; *In re Ramey* (1999) 70 Cal.App.4th 508, 512.) Reducing the prior felony underlying the enhancements pursuant to section 1170.18 therefore raises issues regarding their ongoing validity.

Defendant contends the plain language of section 1170.18, subdivision (k) prevents imposition of the enhancement after the primary offense is reduced to a misdemeanor pursuant to section 1170.18.

In *Buycks*, the Supreme Court analyzed the meaning of the phrase "Misdemeanor for All Purposes" as used in the Act and concluded that, "in the absence of any express declaration of retroactive application, the default presumption applies to subdivision (k) so that its effect operates only prospectively." (*Buycks, supra*, 5 Cal.5th at p. 881.) Applying the rule of *In re Estrada* (1965) 63 Cal.2d 740, the Supreme Court concluded that subdivision (k) applied retroactively to nonfinal judgments. (*Buycks*, at pp. 881-

882.) "As a result, the reduction of a felony conviction to a misdemeanor conviction under Proposition 47 exists as 'a misdemeanor for all purposes' prospectively, but, under the *Estrada* rule, it can have retroactive collateral effect on judgments that were not final when the initiative took effect on November 5, 2014. [Citation.]" (*Id*. at p. 883.)

Subdivision (k) could apply retroactively to final judgments under the aegis of section 1170.18. *Buycks* analogized resentencing pursuant to a section 1170.18 petition for resentencing by the trial court when part of a sentence is stricken on appeal and the case remanded for resentencing. In both instances, the trial court can modify every aspect of resentencing, not just the part of the sentence that was vacated. (See *Buycks*, *supra*, 5 Cal.5th at p. 893.) Application of this rule in section 1170.18 resentencing authorized a trial court to "reevaluate the continued applicability of any enhancement based on a prior felony conviction." (*Buycks*, at p. 894.)

The effect of reducing an enhancement's underlying felony to a misdemeanor pursuant to the Act is summed up thusly: "based on established presumptions we apply to measures designed to ameliorate punishment, a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to misdemeanor, so long as the judgment containing the enhancement was not final when Proposition 47 took effect. In addition, finality aside, a defendant who successfully petitions for resentencing on a current Proposition 47 eligible conviction may, at the time of resentencing, challenge a felony-based enhancement contained in the same judgment because the prior felony conviction on which it was based has since been reduced to a misdemeanor." (*Buycks*, *supra*, 5 Cal.5th at p. 879.)

The interpretation of subdivision (k) in *Buycks* applies to the on-bail enhancement and the prior prison term enhancement in section 667.5, subdivision (b): "Proposition 47's mandate that the resentenced or redesignated offense 'be considered a misdemeanor for all purposes' (§ 1170.18, subd. (k)) permits defendants to challenge felony-based

section 667.5 and 12022.1 enhancements when the underlying felonies have been subsequently resentenced or redesignated as misdemeanors." (*Buycks, supra*, 5 Cal.5th at p. 871.) Defendant contends his on-bail enhancement is no longer valid in light of *Buycks*. He further contends that one of his prison priors is also invalid under *Buycks* because the felony underlying one of the priors was reduced to a misdemeanor pursuant to section 1170.18[3]

Defendant admitted to the prior prison term and on-bail enhancements before Proposition 47 took effect. An order granting probation and suspending imposition of sentence is an appealable order (§ 1237, subd. (a)), and, if not appealed from, generally becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421). While the enhancements were thus final when the trial court imposed sentence and terminated probation, defendant had not yet been sentenced on them when Proposition 47 went into effect. Since a sentence had not been imposed on the enhancements when Proposition 47 took effect, we conclude subdivision (k) applies to his enhancements under the Supreme Court's application of *Estrada* in *Buycks*. As the felonies underlying both enhancements were reduced to misdemeanors before the trial court imposed sentence on them, the enhancements are no longer valid and must be stricken.

II

In his original brief, defendant contended the trial court should have granted his section 1170.18 petition as to his felony FTA convictions that were based on felonies

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[3] We grant defendant's request to take judicial notice of defendant's section 1170.18 petition seeking to reduce his 2005 conviction for possession of a controlled substance (Health & Saf. Code, § 11350) to a misdemeanor, the relevant charging and sentencing records of that conviction, and the People's response to the petition. (Evid. Code, §§ 452, 459.)

reduced to misdemeanors pursuant to section 1170.18. His claim is based on the "for all purposes" language of section 1170.18, subdivision (k). He does not raise this contention in his supplemental briefing following the remand from the Supreme Court.

In *Buycks*, the Supreme Court held that subdivision (k) did not apply to the crime of felony failure to appear while on bail (§ 1320.5) because a felony conviction under the statute is not contingent on the defendant being convicted of the underlying felony offense for which he or she had been released on bail (*Buycks, supra*, 5 Cal.5th at pp. 891-892). The same reasoning applies here.

As we have observed before, "[t]he criminal conduct proscribed by section 1320, subdivision (b), is grounded in the violation of a contractual agreement between a defendant and the People . . . ." (*People v. Jenkins* (1983) 146 Cal.App.3d 22, 28.) It is now a specific intent crime (see *People v. Wesley* (1988) 198 Cal.App.3d 519, 522-524 [discussing statutory history]), and a crime of moral turpitude (see *People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556-1557), that is complete when the defendant willfully fails to appear "in order to evade the process of the court." (§ 1320, subds. (a) & (b).)

The severity of a felony FTA is not lessened by the outcome of the underlying charge, because section 1320 applies to persons charged with or convicted of crimes. The "convicted of" language was added to clarify that the statutes applied to persons on-bail postconviction, which had been uncertain before. (See *People v. Jimenez* (1993) 19 Cal.App.4th 1175, 1177-1181 [resolving issue as to § 1320.5 (the on-bail FTA statute)], followed by Stats. 1996, ch. 354, §§ 2-3, pp. 2452-2453 [amending both §§ 1320 & 1320.5 to encompass postconviction FTA].) The usage of "or" unaccompanied by any indication that what follows is qualified, "indicates an intention to use [or] disjunctively so as to designate alternative or separate categories. [Citations.]" (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680.) A defendant is charged with crimes contained in an accusatory pleading, which exists to provide defendant with notice of the charges.

(See *People v. Fitzgerald* (1997) 59 Cal.App.4th 932, 936.) Here, the defendant was charged with a felony each time he promised to appear as directed.

Because FTA is premised on defendant's breach of contract (*People v. Jenkins*, *supra*, 146 Cal.App.3d at p. 28), whether a defendant is convicted of the underlying offense is immaterial to the disposition of the failure to appear charge (cf. *People v. Walker*, *supra*, 29 Cal.4th at p. 583 [it is the legislative view that punishment for jumping bail under § 1320.5 is proper regardless of the disposition of the underlying offense]). Applying *Buycks*, we conclude subdivision (k) does not apply to his FTA conviction.

DISPOSITION

The on-bail (§ 12022.1) and prior prison term (§ 667.5, subd. (b)) enhancements are stricken. As modified, the judgment is affirmed. The trial court shall prepare an amended abstract of judgment reflecting the modified judgment and send a certified copy to the Department of Corrections and Rehabilitation.

/s/
Blease, Acting P. J.

We concur:

/s/
Butz, J.

/s/
Mauro, J.